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IN THE

Supreme Court of the United States

October Term, 1968

No. 965

EDWARD J. McKENZIE, JR.,
Petitioner,

vs.

THE UNITED STATES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

EDWARD J. McKENZIE, JR.,
37 Victory Avenue,
Lackawanna, New York 14218.

BATAVIA TIMES, LAW PRINTERS,
BATAVIA, N. Y.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner prays that a writ of certiorari issue to review the decision of the United States Court of Claims entered in the above entitled Court of Claims case No. 375-66 on June 17, 1968, and affirmed in denying Petitioner's motion for a rehearing on October 18, 1968.

Opinions Below

The decisi n of the Court of Claims is reprinted in Appendix "A" hereto annexed and in Appendix "B" hereto annexed.

Jurisdiction

The jurisdiction of this Court is invoked under 28 USC Section 1255 (1).

Questions Presented

1. Has the United States Court of Claims added to, and changed the requirements for a successful federal employee's back pay suit contrary to the decision of the United States Supreme Court in United States v. Wickersham, 201 U. S. 390 (1906).

2. Is the United States Court of Claims bound by the final decision of an administrative agency rendered below or does the said Court of Claims have a right to review the case "*de novo*" and reach a contrary decision.

3. Where a United States statute precludes judicial review, did the United States Court of Claims commit error in deciding contrary to the decision of the United States Civil Service Commission, Retirement Division, which said Retirement Division decision is statutorily unreviewable.

4. Is the decision of the United States Supreme Court in United States v. Wickersham, 201 U. S. 390 (1906) as to the federal employees back pay cases, sufficient in itself in that area of the law, or should the United States Supreme Court examine the question further with the view to defining what an illegally discharged federal employee is required to do upon his separation to show his readiness and willingness.

5. Do the citizens of the United States have a constitutional right under due process to rely on the reported *stare decisis* of the Court of Claims of the United States, when said citizens are trying to make a decision as to whether to go ahead with, and pay the expense of, a petition in that Court for relief on a claim, when the Court of Claims at least in the case at bar, and possibly in others, exercises a "*ad hoc*" policy differing from its *stare decisis*, said *ad*

hoc policy of which prospective claimants are unaware because such decisions are unwritten.

Statement of this Case

This is a federal employees back pay case which originated in the United States Court of Claims. The background of the case is: Petitioner employed by the United States Navy Department in a civilian capacity, on his doctor's certification requested a one year sick leave of absence. The agency turned the request down and, further, as a penalty for making such a request the agency notified Petitioner of their intention to separate Petitioner for disability using Petitioner's own statements that he needed the sick leave, and without further medical examination by a government doctor. Upon receipt of this notification Petitioner applied for disability pension and the U. S. Civil Service Commission Retirement Division turned down the application on the grounds that the Petitioner was not disabled and was able to perform his duties. The Navy Department deliberately ignored the Retirement Division's decision and reiterated their intention to separate Petitioner and did so separate Petitioner for disability despite the Retirement Division's decision that Petitioner was not disabled. Petitioner appealed the decision to the Civil Service Commission and he was upheld in his contention that the separation was illegal and the Navy Department was ordered to reinstate the Petitioner on the grounds that the agency action was unwarranted and unjustified. Petitioner subsequently returned to work, applied for his back pay, and resigned. The back pay application was turned down by the Comptroller on the recommendation of the Navy Department who persisted in their position despite the Civil Service rulings. Petitioner petitioned the Court of Claims under 5 U. S. C. 652 (b) (2) and 5 U. S. C. 863.

The Court of Claims then granted summary judgment to Defendant and dismissed Petitioner's petition on the grounds that Petitioner was not ready, willing and able to perform his duties. A decision contrary to the decision of the Retirement Division decision that Petitioner was able and contrary to the decisions of the Court of Claims in similar cases that they had decided. The Defendant never disputed Petitioner's statement of facts and the Court of Claims did not make a finding of fact. At no time did Petitioner acquiesce in the separation and at all times Petitioner made his appeals in the proper manner and on time.

Reasons for Granting the Petition for Writ of Certiorari

1. It is of the utmost importance in this era of federal employment numbering in the millions, that these employees shall know exactly what procedure they have to follow and what they are required to do when they are confronted with a prospective or actual illegal separation from their federal position. It is vitally important that they know at the very onset of their separation just what they have to do so as to protect their rights under the law and what they have to do to prevent and/or avoid prejudice to their eventual cause of action to recover their position and salary. These questions are ones of important policy relating to federal back pay cases in general, not just to the case at bar. Petitioner contends that federal employees have a right to be apprised of the answers to and to any changes in the law with respect to these questions and if the United States Court of Claims by its decision in the case at bar, has changed or added to the law in this area, then the Supreme Court should review that decision and if such decision is arbitrary one then the Supreme Court should reiterate the law and mandate the same to the Court of Claims or change it to meet the conditions and requirements of this new era.

Citizens of the United States and federal employees in particular have a right to be apprised by statutes in writing or reported written decisions just what the law is, so that they will be able to make an intelligent and economically sound decision in advance of any prospective cause of action as to whether they should pursue their remedy with at least some hope of success, or if the law is clear that to do so would only lead to failure or dismissal, not to pursue the matter.

When Petitioner was confronted with the intention of the agency to separate him for disability he did what the law required him to do to preserve his right at law with respect to regaining his position and salary. He appealed to the Civil Service Commission on time. This is the only avenue of expression of his willingness and readiness that is open to him. He has been cast out and he has objected and at all times afterward has showed his non-aquiesence. What more can be done. The Court of Claims implies that there is more. If this be so then the case of United States v. Wickersham, 201 U. S. 390 is not enough.

The Court of Claims in its reported written decisions appears to conform to the law of United States v. Wickersham, but in actuality it apparently exercises an arbitrary policy of non written *ad hoc* decisions at variance with their reported, ostensibly exemplary decisions.

It would appear then that the case of United States v. Wickersham, 201 U. S. 390 is not clear as to what a federal employee has to do upon being iliegally discharged to show *prima facie* that he is ready and willing to work and that it is vitally important that the Supreme Court rule in this area.

2. The case at bar is a small case monetarily and it is a fact that in a case as small as this one because of fees, prospective printing costs, attorney's fees, etc.,

it is economically unfeasible to pursue an appeal to the United States Supreme Court. Thus not being confronted with the specter of possible review of such cases the Court of Claims tends to be arbitrary in its decision making and it is thus in need of supervision by the Supreme Court not only for purposes of the case at bar, but in the interests of the public at large who in the future might invoke the jurisdiction of that Court.

3. The regulations covering Civil Service Retirement found in 5 U. S. C. Sec. 8347 (c) covers the unreviewability of decisions of the Retirement Division as follows: "The Commission shall determine questions of disability and dependency arising under this subchapter. The decisions of the Commission concerning these matters are final and conclusive and are not subject to review. . . ."

The question of the ability of the Petitioner to perform the duties of his position was decided by the Retirement Division and such decision is unreviewable, yet the Court of Claims decided that the Petitioner was not "able", a decision in conflict with and contrary to a United States statute.

Conclusion

In view of the foregoing, a Writ of Certiorari should issue to review the judgment of the United States Court of Claims in the above entitled cause.

Respectfully submitted,

EDWARD J. McKENZIE, JR.,
37 Victory Avenue,
Lackawanna,
New York 14218.

Appendix "A"

IN THE
UNITED STATES COURT OF CLAIMS

No. 375-66.

EDWARD J. McKENZIE, JR.,
v.
THE UNITED STATES.

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skelton and Nichols, Judges.

This case comes before the court on defendant's motion, filed January 30, 1968, and plaintiff's cross-motion, filed March 28, 1968, for summary judgment. Upon consideration thereof, together with the responses thereto, oral argument of counsel for defendant and the briefs of the parties, the court finds that by documentary evidence, the defendant has made a *prima facie* showing that plaintiff was not ready, able, and willing to work; that plaintiff has filed no affidavit that he was ready, able, and willing to work and that he has not asked for a trial of his readiness, ability, and willingness to work, and

IT IS THEREFORE ORDERED that defendant's said motion for summary judgment be and the same is granted, plaintiff's cross-motion for summary judgment is denied and plaintiff's petition is dismissed.

JUN 17 1968.

Received June 19, 1968.

BY THE COURT,

Chief Judge.

Appendix "B"

IN THE
UNITED STATES COURT OF CLAIMS

622-52 MARTIN VON CARSTANJEN,
139-58 IRVING A. KANAREK,
186-61 LULA A. McGLASSON,
348-64 NAGER ELECTRIC CO., INC. and KEYSTONE ENGINEERING CORPORATION,
375-66 EDWARD J. McKENZIE, JR.,
8-68 HARRY H. DRILL,

v.

THE UNITED STATES.

Before Cowen, Chief Judge, Laramore, Durfee, Davis, Collins, Skelton and Nichols, Judges, except that Judge Davis took no part in the consideration and decision of No. 622-52 and Judge Collins took no part in the consideration and decision of No. 186-61.

ORDER.

These cases come before the court on motions for rehearing, new trial, reconsideration, to alter the judgment of the court and for further relief under Rules 68 and 69 of the rules of this court and, on consideration thereof,

It is Ordered this 18th day of October 1968, that said motions be and the same are denied as follows:

622-52 Martin von Carstanjen. Plaintiff's motion for rehearing.

139-58 Irving A. Kanarek. Plaintiff's motion for rehearing and/or new trial.

186-61 Lula A. McGlasson. Plaintiff's motion for reconsideration under Rule 68.

348-64 Nager Electric Co., Inc. and Keystone Engineering Corporation. Defendant's motion for rehearing and reconsideration.

375-66 Edward J. McKenzie, Jr. Plaintiff's motion for a rehearing to alter the judgment of the court and/or for a new trial.

8-68 Harry H. Drill. Plaintiff's motion and proposed "Just Terms" for relief of plaintiff from the order, and/or judgment, and/or "Proceeding" of the court entered on June 7, 1968, dismissing Case No. 8-68.

BY THE COURT,

DON N. LARAMORE,
Acting for the Chief Judge.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 965

EDWARD J. MCKENZIE, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

We respectfully invite the attention of the Court to the following facts, which show that the petition for a writ of certiorari was filed out of time.

The Court of Claims dismissed this action on June 17, 1968, and denied petitioner's motion for a rehearing on October 18, 1968 (Pet. App. 1). The petition for a writ of certiorari was filed on Saturday, January 18, 1969, ninety-two days thereafter, and the time for petitioning was not extended. In relevant part, 28 U.S.C. 2101(c) provides that "any writ

of certiorari intended to bring any judgment or decree in a civil action * * * before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree." Since these limits are jurisdictional, the petition should be denied as untimely.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1969.

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